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In the

United States Circuit Court of Appeals

Ninth Circuit

Appeal from the District Court of the United States for the District of Oregon

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, *et al.*,
Defendants and Appellants,

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2400

Brief for Interveners and Appellants, Frank Terrace and each and all of the persons whose names are specifically set forth in the title to this cause, commencing with and including the said Frank Terrace, down to and including John Zoffi, being all of the persons who, by leave of Court, filed their joint complaint in intervention in this cause on the second day of December 1908.

CHARLES E. SHEPARD,
Solicitor for Interveners and Appellants, Frank Terrace and others.

DEAN BURKHEIMER,
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STATEMENT OF FACTS.

On the 25th day of July, A. D. 1866, there was passed by Congress and approved by the President of the United States, an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," which act thereupon became operative and whereby it was enacted in substance and legal effect that the "California and Oregon Railroad Company," a corporation organized under an act of the state of California, and such company organized under the laws of Oregon as the legislature thereof should thereafter designate, were authorized to locate, construct and maintain a railroad and telegraph line between Portland in Oregon and the Central Pacific Railroad in California; and there was to be granted to said companies for the purpose of aiding in the construction of said railroad and telegraph line every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; that there was to be granted to said companies a strip of land 100 feet in width on each side of said railroad track where it passes over the public

lands, including all necessary grounds for stations, buildings, etc.; that whenever said companies or either of them should have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for service, the same having been completed and equipped as provided in said act, then patents should issue to said companies or either of them, for the lands therein granted to the extent of and co-terminous with the completed section of said railroad and telegraph line, and so on in like manner as sections of twenty miles or more should have been completed and equipped, until the entire railroad and telegraph authorized by said act should have been constructed and the patents of the lands therein granted issued; that said companies should file their assent to said act in the Department of the Interior within one year after the passage thereof, and should complete the first section of twenty miles of said railroad and telegraph line within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, 1875; that in case said companies should fail to comply with such conditions by not filing their assent thereto of said act, or by not completing the same as therein provided, then that such act should be null and void and all lands not conveyed by patent to said company or companies, at the date of such

failure should revert to the United States; that the said companies should obtain the consent of the legislatures of their respective states and be governed by the statutory regulations thereof in all matters pertaining to the right of way when not passing through the public lands of the United States (14 U. S. Statutes at Large, p. 239). Said Act of Congres is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 6-13).

On or about the 25th day of June, A. D. 1868, said last described Act of Congress was amended by an Act of Congress entitled, "An act to amend an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon,' " which said amendatory act provided in substance that Section Six of said former act be so amended as to provide that instead of the times fixed in said section, the first section of twenty miles of said railroad and telegraph line should be completed within eighteen months from the passage of said amendatory act, and that at least twenty miles in each two years thereafter, and the whole on or about the first day of July, 1880 (15 U. S. Statutes at Large, p. 80). Said Act of Congress is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 13, 14).

On or about the 22d day of April, 1867, at Salem, Oregon, certain persons, designing to secure the several grants, franchises and other benefits of said Act of Congress, approved July 25, 1866, organized under the general incorporation laws of the State of Oregon, a corporation known as "Oregon Central Railroad Company," having its principal place of business at Salem, Oregon. Said corporation became known as the "East Side Company," and its line of railroad became known as the "East Side Line," and said company and said line of railroad are so designated throughout this record.

On the 20th day of October, 1868, said East Side Company, in furtherance of its aforesaid design procured a joint resolution to be adopted by the Legislature of the State of Oregon, providing in substance that the Oregon Central Railroad Company, a corporation organized at Salem on the 22d day of April, 1867, under and pursuant to the laws of the State of Oregon, be and the same was thereby designated as the company entitled to receive the lands in Oregon and the benefits and privileges conferred by said Act of Congress of July 25, 1866; said joint resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 17, 18). The time within which to file an assent had expired long prior to the designation of said East Side Company

by the Legislature of the State of Oregon on October 20, 1868, as aforesaid. The East Side Company applied to Congress during the session commencing in December, 1868, for an extension of the time within which to file its assent.

On the 10th day of April, 1869, there was passed by Congress an act entitled, "An act to amend an Act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six," in terms as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: *Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said

> Act or this amendment be construed to entitle more than one company to a grant of land: *And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre'' (16 U. S. Statutes at Large, p. 47).

On the 8th day of June, A. D. 1869, said East Side Company, through its board of directors adopted a resolution providing in substance that such company, the Oregon Central Railroad Company, of Salem, Oregon, incorporated at Salem, Oregon, April twenty-second, 1867, by such resolution accepts all of the provisions, rights, privileges and franchises of said Act of July twenty-fifth, 1866, and of all acts amendatory thereof, and upon the conditions therein specified, and that such company by such resolution, gives its assent thereto and providing for the notification of the United States through its Secretary of Interior at Washington, of the giving of such assent; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 21-23).

On or about the thirtieth day of June, A. D. 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States a certified copy of said resolution last herein set forth.

On or about the twenty-ninth day of October, A. D. 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States, a map of survey and location of the first sixty miles of its projected line of railroad.

On the twenty-fourth day of December, A. D. 1869, said East Side Company completed the construction of the first twenty miles of its aforesaid line of railroad, commencing at the City of Portland, and on the thirty-first day of December, A. D. 1869, the same was examined and approved by commissioners appointed therefor pursuant to the provisions of Section Four of said Act of Congress, approved July 25, A. D. 1866.

On or about the 17th day of March, A. D. 1870, the promoters, officers and stockholders of said East Side Company, did organize the appellant (defendant) Oregon and California Railroad Company, under the general incorporation laws of the State of Oregon. The principal object of said corporation, as stated in its articles of incorporation, was to become the successor of said East Side Company, and as such, to receive and exercise the grants, franchises and privileges of said Act of Congress approved July 25, A. D. 1866, and the aforesaid acts amendatory thereof; said articles of incorporation

are set out in full in Complainant's Bill as "Exhibit A" (Transcript, Vol. I, pp. 89-92).

On or about the 29th day of March, A. D. 1870, said East Side Company did execute and deliver to said defendant Oregon and California Railroad Company a certain instrument in writing, purporting to assign, transfer and convey to said defendant Oregon and California Railroad Company all of the property of said East Side Company in and to the grants, franchises and other benefits of said Acts of Congress approved July 25th, A. D. 1866, and the aforesaid Acts amendatory thereof; said instrument in writing is set out in full in Complainant's Bill as "Exhibit B" (Transcript, Vol. I, pp. 93-125).

On said twenty-ninth day of March, A. D. 1870, said East Side Company, by action of its Board of Directors and its stockholders, became and was dissolved and since last mentioned date, no corporate powers or franchises have ever been exercised by, or in the name of, said East Side Company.

On the fourth day of April, A. D. 1870, the defendant Oregon and California Railroad Company, through its Board of Directors, adopted a resolution providing in substance that said Company do accept the grant conferred by such Act of

Congress of July twenty-fifth, 1866, and all amendments thereof, and all the benefits and emoluments therein or thereof granted, upon the terms and conditions therein specified; also that such acceptance and assent be filed in the office of the Secretary of the Interior, together with a copy of the deed of assignment from said Oregon Central Railroad Company; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 26, 27).

On or about the 28th day of April, A. D. 1870, the defendant, Oregon and California Railroad Company, filed in the office of the Secretary of the Interior of the United States an authenticated copy of said last described resolution, and a certified copy of said instrument dated March 29, A. D. 1870; and at all times thereafter said defendant, Oregon and California Railroad Company, has assumed and still assumes, to be the successor of said East Side Company and of all of its rights under said Acts of Congress, as aforesaid.

During the period from about the year 1870 until on or about the month of January, 1873, said East Side Line was constructed and extended from said City of Portland, in the State of Oregon, to a point near Roseburg, a distance of approximately one hundred ninety-seven miles (including said first

section of twenty miles theretofore constructed, as hereinbefore referred to).

On or about the 2d day of June, A. D. 1881, the defendant, Oregon and California Railroad Company, executed and delivered to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, as trustees for the owners and holders of preferred stock, so called, of said Company, a deed of trust purporting to convey all of the lands of said grant of July 25, 1866. Said deed of trust is set out in full in Complainant's Bill as "Exhibit D" (Transcript, Vol. I, pp. 134-165); the defendant, Stephen T. Gage, is now the sole surviving trustee under said deed of trust.

On or about the month of June, 1881, the work of constructing said East Side Line was resumed, and thereafter was continued until on or about the month of January, 1884; during said last mentioned period of construction said East Side Line was constructed and extended from said Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately one hundred forty-five miles.

On or about the 12th day of May, A. D. 1887, the defendant Southern Pacific Company, acquired, and thereafter exercised, ownership and control of

the said defendant, Oregon and California Railroad Company, pursuant to a certain contract in writing, entered into between said defendants on or about the 28th day of March, 1887; said contract is set out in full in Complainant's Bill as "Exhibit E" (Transcript, Vol. I., pp. 166-184).

On or about the 1st day of August, A.D. 1893, the defendant Southern Pacific Company, and the defendant, Oregon and California Railroad Company, entered into a contract of lease in writing, whereby all of the railroad and telegraph lines and other property of the defendant, Oregon and California Railroad Company, were leased to the defendant, Southern Pacific Company, for the term of thirty-four years, which lease is still in full force and effect; said lease is set out in full in Complainant's Bill as "Exhibit G" (Transcript, Vol. I, pp. 189-196).

During the year 1887, the last section of said East Side Line, extending from Ashland, aforesaid, to the southern boundary of Oregon, was constructed.

On the 1st day of January, 1903, there remained unsold of said granted lands about 2,373,000 acres, of which 2,080,000 acres have been patented, and 293,000 acres have not been patented.

Prior to the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, had sold certain of the lands granted under said Acts of Congress, in violation of the terms of the proviso contained in the Amendment of April 10, 1869.

Since on or about the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, have refused to sell any of said lands remaining unsold, in accordance with the terms of said grant, or to any persons, upon any condition whatsoever.

Since the 1st day of January, 1903, and prior to the commencement of this suit, each of these interveners has applied to the defendant, Oregon and California Railroad Company, to purchase one-quarter section of said unsold land, as provided by said Act of April 10, 1869, and has tendered full performance of all of the requirements of said Act, each and all of which tenders, offers and applications have been refused by said defendant.

On the 30th day of April, 1908, Congress, by joint resolution, authorized and directed the Attorney General of the United States to institute this proceeding.

On the 25th day of May, 1908, the complainant, the United States of America, filed its bill of com-

plaint in the Circuit Court of the United States for the District of Oregon, setting forth in substance the foregoing facts, and praying as follows:

First: That all of the lands in said grant, remaining unsold, be forfeited to the United States, and its title thereto quieted; or

Second: That all of said unsold lands are subject to purchase by actual settlers, in accordance with said Acts of Congress, and that receivers be appointed and invested with title thereto, and directed to convey said lands, as required by said Acts; or

Third: That a mandatory injunction issue, commanding and requiring the defendant, Oregon and California Railroad Company, to offer for sale, sell and convey said unsold lands, in accordance with said Acts of Congress;

The complaint further prays for other equitable relief (Transcript, Vol. I, pp. 1-540).

On the 2nd day of December, 1908, leave of Court having been theretofore duly obtained, these interveners filed their bill of complaint in intervention, alleging in substance the foregoing facts, and praying as follows:

First: That complainant and defendants be

ordered to enter an appearance to said bill, and to answer the same;

Second: That a decree be entered, awarding to each of said interveners the land applied for by him, and requiring the defendant, Oregon and California Railroad Company, to execute and deliver to each of said interveners deeds of conveyance of said lands so applied for, upon compliance by said interveners with the requirements of said Acts of Congress, and quieting the title to said land in said interveners, as against all of the defendants;

Third: That the defendants be enjoined from exercising any acts of ownership over said lands pending this suit;

Fourth: That neither the complainant nor any of the defendants herein, recover any of the lands involved herein and applied for by these interveners;

Fifth: For general equitable relief.

On the 2nd day of March, 1909, the interveners, B. W. Nunnally and others, leave of Court being first therefor duly obtained, filed herein their petition in intervention, alleging substantially the same facts as set forth in the bill of complaint in intervention theretofore duly filed by these interveners, as aforesaid, and praying for substantially the same

relief as is prayed for in the bill of complaint in intervention of these interveners (Transcript, Vol. II, pp. 541-639).

On the 14th day of March, 1914, there was filed herein a stipulation entered into between complainant and defendants, defendants-cross-complainants and defendants-interveners; that by the terms of said stipulation it was stipulated and agreed, among other things, that it should not be necessary to include in the printed record of this cause any of the papers or proceedings pertaining to any of the interveners, other than B. W. Nunnally and others (Transcript, Vol. XVI, pp. 8652-8664). For this reason, the complaint in intervention of these interveners is not set out in the transcript.

On the 7th day of April, 1909, there was filed the joint and several demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bills in intervention of all of the interveners herein, including these interveners, upon the grounds:

First: That the bill does not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars;

Second: That said bill does not show any cause or equity entitling the interveners to maintain their suit;

Third: That the bill does not show that the interveners are entitled to a discovery;

Fourth: That the bill does not show that the interveners are entitled to any relief (Transcript, Vol. II, pp. 685-687).

On the 24th day of April, 1911, said demurrers were duly presented and sustained by the Court (Transcript, Vol. II, pp. 694, 695).

On the 9th day of June, 1913, the complainant filed its several motions to dismiss the bills of complaint in intervention of all of said interveners, including these interveners, for want of equity in such bills, and said motions were, on the 1st day of July, 1913, sustained by the Court (Transcript, Vol. III, pp. 1286, 1287).

On the 23rd day of June, 1913, the Union Trust Company, individually and as Trustee, filed its motion to dismiss the complaints in intervention, including the complaint of these interveners, and said motion was, on the 25th day of June, 1913, sustained by the Court (Transcript, Vol. III, pp. 1290-1292).

On the 1st day of July, 1913, the defendants, Oregon and California Railroad Company, Southern

Pacific Company and Stephen T. Gage, individually and as Trustee, filed their motion to dismiss the bills in intervention of the interveners, including these interveners, and on the 10th day of November, 1913, said motion was sustained by the Court (Transcript, Vol. III, pp. 1293-1295).

On the 1st day of July, 1913, the complainant and defendants having adduced their evidence, a decree was entered by the Court, forfeiting all the lands involved in this proceeding, including the land claimed by these interveners, to the United States of America, and quieting the title to the same in the complainant, and enjoining these interveners and all other parties herein from claiming any interest therein.

From the orders and decrees entered in favor of complainant, all of the defendants, cross-complainants and interveners have prosecuted a joint appeal, and from all orders and decrees entered in favor of the defendants against the cross-complainants and interveners, the cross-complainants and interveners have prosecuted a joint and several appeal.

ASSIGNMENT OF ERRORS

(Numbers in brackets are the numbers of said assignments as they appear in the Transcript, Vol. XV, pp. 8283-8391).

1. (51) The court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bill of intervention of the intervener, Frank Terrace, and the other interveners with him in his said bill joined, for want of equity in said bill.

2. (52) The court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as trustee, to the bill of intervention of said interveners, for want of equity in said bill.

3. (53) The court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

4. (54) The court erred in sustaining the motion of the defendant, Union Trust Company,

individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

5. (55) The court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill.

6. (56) The court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to answer said bill in intervention.

7. (57) The court erred in not requiring the Union Trust Company, individually and as trustee, to answer said bill in intervention.

8. (58) The court erred in not requiring the complainant to answer said bill in intervention.

9. (59) The court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill.

10. (60) The court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations

and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them respectively in said bill.

11. (251) The court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them respectively.

12. (254) The court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As, their said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling these interveners and cross-complainants and each of them, to equitable relief; and

Said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

13. (255) The court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands

sought to be purchased by the interveners and cross-complainants herein or any of them.

14. (259) The court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

15. (260) The court erred in holding that the proviso in the said act of April 10, 1869, was a condition subsequent.

16. (261) The court erred in holding that the proviso in the amendment of April 10, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre, was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

17. (272) The court erred in holding that there was jurisdiction in the court on the equity side to decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed

condition subsequent in the proviso contained in the Act of April 10, 1869.

18. (277) The court erred in holding that by its joint resolution of April 13, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize or empower the court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the Act of April 10, 1869.

19. (287) The court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

20. (296) The court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

21. (304) The court erred in holding that the United States, complainant herein, was entitled

to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the Act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

22. (316) The court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

23. (317) The court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by each respectively, upon payment of the purchase price therefor.

24. (318) The court erred in not holding that the defendant, Oregon and California Railroad

Company and other defendants claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

25. (324) The court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, respectively, as prayed for in their several bills.

26. (325) The court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforcible by the interveners and cross-complainants.

27. (326) The court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

28. (331) The court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as sestui que trustent, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

29. (332) The court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

30. (334) The court erred in holding that the proviso in the Act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

31. (337) The court erred in not holding that the proviso in the Act of April 10, 1869, for the sale of lands to actual settlers was intended by

Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

32. (338) The court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

33. (340) The court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settlor of the trust in said lands.

34. (348) The court erred in holding that the United States, complainant herein, had any

right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action, except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands.

35. (350) The court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this

suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government, cannot be had.

36. (353) The court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

37. (354) The court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

38. (355) The court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

39. (359) The court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

ARGUMENT

The Act of April 10, 1869, by the Terms of the Proviso Restricting Sales Created a Trust.

Due regard to the rights of the interveners whom we represent does not require us to follow step by step the elaborate course of reasoning employed in behalf of the Government by its counsel. With a large part of that reasoning and of the discussion of the land grant policy of the United States, its origin and history, and of the discussion of statutory construction in general, we cordially agree. Indeed, it is only when the counsel for the Government reaches the point of arguing that the proviso created a *"condition subsequent,"* entailing forfeiture of the title of all lands not previously sold within the terms of the proviso, that we part company with him. Of course this acquiescence up to that point in the Government's contention, is in view of its brief in the court below. What other or different view, what other or different reasoning, authorities or conclusions its brief in this court may set forth we have no means of knowing at present.

We agree, then, with the learned counsel for the Government that the Act of April 10, 1869, in

general, and its additional proviso amendatory of the Act of July 25, 1866, in particular, expressed a definite intention and policy of Congress; that they were meant to effectuate that intention and policy; that the amendatory proviso was not a mere "unenforcible, directive, regulative covenant;" that it was not a bare *brutum fulmen* of that character, not a counsel of perfection or ethical admonition to be good addressed to a group of selfish promoters more intent on gain than on settlement of the wild country which their railroad was to open up—in short, that the statute and the proviso *meant something.* The sole questions between us and the Government are: What did they mean? And, How is that intent to be realized in act?

Notwithstanding the abundant litigation over land grants and the titles derived from them, lawyers and judges schooled in the common law are very apt to approach a case involving estates and rights originating in a public land grant with the prepossessions derived from the technical logic of the common law. A remarkable instance of that mental attitude is shown in the laborious argumentation as to the construction of the proviso herein as a "condition subsequent." In reading the alleged "demonstration" that it is a *"condition subsequent"*, and is and can be nothing else, we are

transported into the atmosphere of the courts when Coke and Holt and Hale sat on the bench, when the feudal law of land was the sole guide to litigants, and before Mansfield had opened the windows and let in the daylight and fresh air of the modern world. And yet the whole law of land grants—a large and important branch of our public land law—is based on a departure from the old common law of estates, with its feudal rigidity of logic and technicality of terms. For its cornerstone is the doctrine of a grant *in praesenti* of vast tracts indefinite in location and area—*a "float"*—which by later relation becomes defined—the "float" gets anchored—by the co-operating yet independent acts of the railroad surveyors in locating and mapping the road, the federal surveyors in running out the public survey lines on the face of the globe, and the department officers in issuing the patents. Anything so vague, so absolutely indeterminate as an estate of many thousand acres, of not one square rood of which could it be said at the date of the grant, "this is a part of it", would have been scouted in any common law court as void for uncertainty. Without this liberal and modern view of the land grant acts, treating them not only as statutes but as conveyances of a floating estate to be afterwards tied down to a local habitation, we should have had (on strict com-

mon law principles) only a statute inoperative, hence void, *as a grant,* and later sundry patents which would have been the real and only source of title. And these patents, containing no restrictions in terms of the patents, would necessarily vest an unrestricted estate in fee simple in the grantee railroad company. Hence it is only by virtue of the modern doctrine that the land grant act is a floating conveyance, to be later made definite, that the learned counsel is able to tie the "condition subsequent" to the estate as a qualification of the fee. He stands, then, with one foot on the modern land grant doctrine to get his *pou sto*—his foothold to argue that there is any limitation on the estate; and having got that, he shifts to the other foot and stands on the most rigid construction of this proviso as a condition subsequent, in order to defeat the granted estate.

Nor does the inconsistency of the complainant's case end here. For it comes into a court of equity to enforce the technical construction of a clause of ambiguous meaning. Now no one doubts that courts of equity in the cases cited in the Government's brief and in other cases have enforced forfeitures. Nevertheless, it is a commonplace that equity abhors forfeitures. Whether in a given instance equity will permit or refuse a forfeiture depends not so much

on general doctrines as on the circumstances, as they appeal to the chancellor's conscience or repel it. In many cases, the court has said it will leave the complainant to his legal remedies; in others, that it will grant the forfeiture. On what does the difference depend? How is this wide judicial discretion to be guided? The difference depends on other fundamental notions of equity, such as: "He who seeks equity must do equity", and "Equity will protect the rights of all and do complete justice", and "Equity favors the diligent". And the chancellor's discretion is to be guided by the light thrown by the conduct of the parties, their rights and wrongs, the mischiefs and losses that will be avoided or caused by the one or the other ruling. It cannot, then, be said in a court of equity, as in one of law, that (granting the technical elements of a forfeiture), the forfeiture will be enforced as of course. "It all depends."

We must approach the subject of the proper construction of the proviso, bearing in mind that we are not dealing with the technical purport of a clause in a common law conveyance, but with the true intent and effect of an integral part of a scheme of disposing of vast areas of public lands in an uninhabited wilderness; that such scheme and every part of it must be viewed in the light of the history

of a half century of legislation by Congress and of settlement of the "great West"; that while the words are those of Congress, their intent and effect are what the court can say they are, and the court is not to abnegate its function and accept what this committee may have reported or that congressman —even an able land lawyer—may have said they are. And above all we are to remember that this is only a single instance in a great land grant system which was utterly severed from the technical doctrines of common law estates by the doctrine of a "float" which the Supreme Court worked out *and which is the foundation stone of all land grant estates,* and that *in this court* we are to seek not the *rigor and vigor* of legal terms, conditions and estates, but broad equity and complete justice among all parties.

We maintain, then, *that the proviso in the Act of 1869 created a trust.*

What are the elements of the trust?

They are all contained within the terms of the land grant in the Act of July 25, 1866, as qualified by the amendatory proviso in the Act of April 10, 1869:

> "Provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not exceeding one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre."

"The act aforesaid" means the Act of July 25, 1866.

Since there are no express words of trust, this is *an implied trust.*

1 *Perry on Trusts* (6th Ed.), Secs. 24, 25, 112.

Lane vs. Lane, 8 Allen, 350.

No particular form of words is required to create a trust. As to express trusts, "there is no particular formality required or necessary in the creation of a trust."

1 *Perry on Trusts* (6th Ed.), Sec. 82;

Tyler vs. Tyler, 25 Brad. (Ill.) 339;

O'Rourke vs. Beard, 151 Mass. 9;

Gisborn vs. Charter Oak L. Ins. Co., 142 U. S. 326.

"Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. *Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed THROUGH THE MEDIUM OF A TRUST.*"

1 *Perry on Trusts* (6th Ed.), Sec. 112;

Lane vs. Lane, 8 Allen, 350.

"Courts of equity will imply a trust from the contracts of parties, *although there are no*

words of trust in the instrument; as if a person for a valuable consideration agrees to settle a particular estate upon another, *or if he agrees to sell an estate to another,* the settlor or vendor becomes a trustee of the fee for the purposes of the settlement or for the purchaser."

Perry on Trusts (6th Ed.), Sec. 122.

The creation of a trust may be shown by the correspondence and agreements of the parties.

Loring vs. Palmer, 118 U. S. 321;
Dorr vs. Clapp, 160 Mass. 542;
Hutchins vs. Van Vechten, 140 N. Y. 119;
Gates vs. Avery, 112 Wis. 277.

And it has been expressly held by the United States Supreme Court that no technical language is necessary to the creation of a trust; and a devise accompanied by words imperative, expressing a wish or recommendation that the devisee will apply the property to the benefit of others, may create a trust.

Colton vs. Colton, 127 U. S. 300.

See, also,

Russell vs. U. S. Trust Co., 127 Fed. 446;
McDuffie vs. Montgomery, 128 Fed. 108;
Burnes vs. Burnes, 137 Fed. 793;
Collister vs. Fassit, 163 N. Y. 289.

Nor can there be any doubt that the United States can create a trust—as indeed it has often

done. As an incident of its sovereignty, it can dispose of its property in any mode which the Congress in the exercise of its legislative judgment may deem for the public interest; and it can attach to its gift or sale of the public lands any legal or equitable qualification which it chooses to impose. Therefore, "the state itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees; and such trustees are equally amenable to the jurisdiction of chancery."

1 *Perry on Trusts* (6th Ed.), Sec. 30;

Buchanan vs. Hamilton, 5 Ves. 722;

Comrs. vs. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 433.

Sundry instances of such federal grants of public lands in trust exist, of which we cite only two as illustrations.

The sixteenth section in every township, not sold or otherwise disposed of, and in such case other land in lieu thereof, was granted to the future State of Wisconsin in the enabling act.

Beecher vs. Wetherby, 95 U. S. 517.

Certain public lands were granted to the future State of Montana for a normal school, in the enabling act.

Montana ex rel. Haire vs. Rice, 204 U. S. 291.

In each case the grant was treated as a trust, although when the act was passed the state had not come into existence.

We have, then, a competent creator or "settlor" of a trust; and it is immaterial whether such creator is to be considered as a donor or a vendor of the property conveyed, because it was vested with the sovereign power either to give or to sell its own. And we have a form of words—a phraseology—which can be construed as creating a trust if the court finds in the words and the concomitant circumstances the intent—since no technical or precise form of words was required, and the whole case turns on the question of intent. We freely admit that it is also possible to extract the legal essence of a "condition subsequent" from the same words—the proviso—because the very question before the court, and the only question on which the interveners' rights depend is: Was the proviso a *condition subsequent* or a *trust?*

The Supreme Court of New Hampshire, after stating a case involving a donation to a city "upon condition" of a certain perpetual use of the premises, said:

> "It would seem, therefore, that the question whether the conveyance was upon condition

> subsequent or not was wholly *one of construction,* and that its answer was to be found in *the ascertainment of the intention of the parties* as expressed in the deed and the contract in pursuance of which the conveyance was made."
>
> *Ashuelot Nat. Bk. vs. Keene,* 74 N. H. 148; 65 Atl. 826.

The exact situation here could not be more clearly or tersely put.

It will, no doubt, be argued by opposing counsel for both the Government and the railroad company that the fact that Congress can create a trust and that it adopted a form of words which are capable of construction to that result is very far from showing that a trust did ensue. We readily admit it; all we have said hitherto is only preliminary, and goes to show that the circumstances do not debar that conclusion.

Naturally, the learned counsel for the United States spent by far the larger and stronger part of his brief below on his attack on the railroad company's position that the proviso was only "an unenforcible, directive, regulative covenant." Inevitably so; for if the court adopted the company's theory, the company would remain sole master of the field, and neither the Government nor the interveners would retain any standing in court or any enforcible rights. The Government's argument against the

covenant theory is therefore in our interest as well as its own. But its counsel has paused in his attack on the covenant theory long enough to criticize the trust theory, because of the proviso's "restraint upon a distrusted grantee having an adverse interest," indefiniteness of the beneficiary, and uncertainty of the terms of the supposed trust.

With the possibility of a trust, therefore, in the existence of a competent settlor and an instrument construable as creating a trust, we proceed to consider whether that construction can and should be placed on the instrument—the Act of 1869—or in other words, whether the other elements of a trust are found therein.

What are those other elements of a trust? They are:

1. A trustee.

2. A trust fund or estate.

3. Beneficiaries.

4. A duty of the trustee as to the trust estate.

1. *A Trustee.* It will not be disputed that we have here a corporation competent to take and act as trustee. Any legal person capable of receiving the legal title may be made a trustee.

1 *Perry on Trusts* (6th Ed.), Secs. 39, 42, 43;

Jones vs. Habersham, 107 U. S. 174.

Judging from the brief of counsel for the Government in the court below, the only points that will be made in this court on the capacity of the railroad company to act as trustee are that, being entitled to retain for its own uses in the construction of the railroad the proceeds of sales up to $2.50 per acre, it could not be both trustee and beneficiary; and that its interest was adverse and it was therefore distrusted by Congress.

If the railroad company were to be the sole beneficiary of the trust, the inference of a trust from other facts would fail, because by the instant union of the legal and equitable estates when the title in fee vested in the company the trust would never come into being.

1 *Perry on Trusts* (6th Ed.), Sec. 347.

But this rule is limited to instances of exact identity of the entire estate meeting simultaneously in both trustee and *cestui;* and one *cestui* out of a number or a multitude who are to benefit from the trust estate may be the trustee for himself and for all the others without impairing the trust.

Burbach vs. Burbach, 217 Ill. 547;

Nellis vs. Rickard, 133 Cal. 617;

Story vs. Palmer, 46 N. J. Eq. 1;

Robertson vs. De Brulatour, 188 N. Y. 301;

Losey vs. Stanley, 147 N. Y., 560.

See,

1 *Perry on Trusts* (6th Ed.), Secs. 59, 297, 347.

2 *Id.,* Sec. 476*a.*

There is, then, no inherent capacity of the company to act as trustee, and no consequent invalidity of the trust, arising from the fact of the company's beneficial interest, viz: its right to retain the entire proceeds of sales made under the terms of the proviso.

But it has also been argued below and will be argued again at this bar, that Congress cannot have intended a trust, because it had no confidence in its grantee, the railroad company; that previous experience with railroad land grants and their grantees had been unfortunate and destructive of public confidence in the good faith and honor of the promoters of such enterprises; and that since the company had an adverse interest Congress would not entrust to it an imperial grant under the terms of a *trust,* but would do so under pain of a *total forfeiture* if it broke the terms of the grant.

Now there is not the least evidence of any distrust in Congress of this particular company. It is quite true that by 1869 experience with the railroad land grants, especially the transcontinental ones, had shown that the earlier legislation had not sufficiently hedged about their disposal so as to insure their two main objects—the construction of the roads and the settlement of the country. But it must be borne in mind that at that time the railroads which were opening the great western country, and abolishing the perils, losses and expense of overland or ocean travel to the Pacific Coast were regarded as public benefactors, not public enemies; and that the present baiting of all public service corporations had not become the vogue. A wise caution to safeguard a grant, not a deep distrust of the grantee as a villian, was therefore the rational attitude of Congress and the nation; and all the circumstances must be looked at in that *natural* light; not in the present lurid light of the fires of political frenzy. That, indeed, is one of the primary rules of construction of transactions many years past, because it is a prime rule of historical criticism—to view the case by the light of *that* time, not of *this*. So viewed, we can see that if Congress distrusted the company so deeply as the Government's counsel would make it appear, that was the strongest reason

for refusing the grant *in toto,* not for granting it on penalty of loss. For if the company could not be trusted at all, and if it violated the condition it would be sure to lose the grant sooner or later, and thus the very thing that the counsel puts forward as the primary object and motive of Congress—the settlement of the country in small tracts for agriculture—would fail. This vast grant, or some large part of it would thus be thrown back into the general domain of the public lands without the advantage of segregation and improvement as farms, and of promotion of the same diverse ownership of the alternate government sections. And, moreover, the other main object of the land grant—construction of the road—to the extent of a forfeiture would fail or at least be crippled. Such distrust, then, as is now asserted, if expressed in the form of a condition subsequent would defeat the very objects that inspired the grant. On the other hand, the company's interest in the proceeds, its right to retain them for building the road, would no more militate against *entrusting* the grant to the company, than against a pure and unhampered donation of it, as in the Union Pacific and other grants. Many instances have occurred, many must have been known to the lawyers then in Congress, where a distributive part of a trust fund or income went to one or more

trustees. The authorities above cited show there is nothing inherently vicious or fatal to the idea of a trust in participation by a trustee in its benefits. That fact of itself, then, did not hinder Congress from creating a trust, and it does not forbid the construction we contend for. It leaves the subject, as before, open to the construction demanded by all the circumstances.

But the Government's counsel argues that it could not have been the purpose of Congress to commit to a party having a known adverse interest the discharge of a trust involving several million acres of public lands, and to do so in the form of a restraint.

The fallacy in this argument lies in assuming that the company's interest was adverse in the sense intended; and then on the basis of this assumed hostility, which contradicts a relation of confidence, in arguing that a trust cannot be inferred from words of restraint. In a bargain of sale the interests of vendor and vendee are so contrary that they are commercially hostile. And in fiduciary relations generally the law will not permit one to act where his self-interest conflicts with his fiduciary duty and interest. But we have no such case here. The situation was this: vast tracts of wild land, almost every acre owned by the Government; pressing need

of a railroad as the only effective means of opening and settling the region within reasonable time; a prior land grant in aid of the railroad offered but lapsed; and a new applicant for the grant. Thereupon Congress says to the applicant: "The country needs the railroad; we want to help you build it so as to induce sales to actual settlers on both what we give away and what we keep. We will give you one-half the land for twenty miles on each side if you will build the road and will sell the land to actual settlers in quarter section tracts or less at not over $2.50 per acre. You are to keep the money and use it to buid the road." The company then said: "Agreed. We will accept your deed on those terms, and will sell the land thus and so." The Government had three distinct motives or interests: (1) To get the road built as the only feasible means to its ultimate end, viz: (2) To get the country opened and cultivated by actual settlers on the railroad land, which would aid it (3) To sell its own land at like reasonable prices to actual settlers. The raliroad company had three distinct motives or interests: (1) To get the aid of the land grant; (2) To convert the land into cash in order to build the road; and (3) To get the country settled—both the granted lands and the reserved public lands—in order to increase railroad traffic. None of the com-

pany's motives antagonized any of the Government's; on the contrary, they largely concurred. Fidelity to each interest of its own by each party promoted the success of the other interests of itself and of the other party. The fact that the company was limited as to sales did not create any antagonism or inconsistency with a trust. Restraint does not spell hostility. In the vast majority of trusts there is some limitation of the trustee's powers, either as to the fund, its use, sale, etc., or as to the *cestui,* when and how he is to receive the benefit, etc. There is a positive and a negative side to every direction to a trustee. A provision that the income to be paid to A quarterly forbids it to be paid to B at all, or to A only annually. A provision (or "command" if the Government's counsel prefers the word) that land be sold only to actual settlers in quarter-sections or less at not over $2.50 per acre, is a prohibition not to sell to non-settlers in township tracts at $5.00 per acre—or for that matter at ten cents an acre. The fact that the positive term has a negative obverse does not debar the transaction from being a trust. For if that were the case most trusts would fail, and become strict estates on condition, by parity of reasoning. And the restraints drawn in three directions leave ample liberty in the trustee *in the very line of both its own and its*

grantor's interest. For the maximum price limit was the same as the maximum price of Government lands to settlers then; and the maximum quantity was the limit of agricultural lands under homestead or pre-emption lands; and actual *bona fide* settlers were the only class allowed by law to acquire public lands. Hence there was no restraint that would hamper the railroad in attracting buyers, or would drive incoming settlers to take up public lands in preference. Quite the contrary, the company had the advantage, in that it was free to bargain for a less price and to sell parcels irrespective of lines of public survey; while the Government land officials were bound by the cast-iron rules of the statute and the land office. The limits drawn were reasonable *and tended to realize the interests of both parties.* They were elastic and left a wide discretion to the grantee in trust. They were practical as based on previous experience in settling public lands, and yet preventing a dishonest diversion by sales to syndicates and "rings" and by withdrawal from the market. Every sale made within the terms furthered all of the interests of both the creator and the trustee of the trust. Any refusal to sell on those terms, any sale in breach of those terms ran counter to all those interests. Therefore the interests of both parties co-operated in a faithful performance of the trust;

and there was no antagonism unless every trustee is *ipso facto* an enemy of the settlor of the trust.

2. *A Trust Fund or Estate.*

3. *Beneficaries.*

In view of the objection of indefiniteness to the trust theory, we deem it best to discuss these two elements of a trust together.

The objection that the fund or estate was too indefinite to become the subject of a trust when the Act of April 10, 1869, was enacted, and hence the trust did not come into existence and attach itself to the land, will probably not be seriously pressed. For, to urge that point on the part of either the Government or the railroad company would cut the ground from under the objector's feet. On the part of the Government, because, as we have already shown, it gets its standing to argue the condition subsequent theory only by virtue of the doctrine of a grant *in praesenti* in the Act of 1869 to which the proviso attached itself as a condition, although the land was not yet identified. And on the part of the company, because it applied for and obtained patents years later by virtue of that same act when the progress of construction had identified the lands as due to it. Yet we may pause a moment or two to consider the bearing of that *in praesenti* doctrine

as fixing by relation a floating grant. For it is so utterly abhorrent to all common law doctrine of estates, that the two cannot stand in any harmonious relation. The feudal law of estates grew up in a land where boundaries, estates and titles were settled, and no public land in our sense existed; the doctrine of a floating grant had to be contrived, without precedent, to meet the novel situation of a country with vast tracts of wild lands, unsurveyed, unsettled, in a legal sense without a past. That doctrine bears the signs of an equitable rather than a legal origin. Like many doctrines and remedies invented by the English chancery it sprang from the necessity of the case to supply a defect of the law in a novel state of facts. The "relation" between the later patent and the earlier grant is simply the maxim: "Equity will regard that as done which ought to be done" put into effect. Now this equitable origin of a settled rule of our public land law makes it easy to see that the same result should ensue as to a trust in a floating land grant. For by parity of reasoning the trust is a "float" as to the precise land it covers so long as the subject of the grant remains indefinite; and as soon as that becomes defined by approved lists in the General Land Office, or by patents issued therefrom, the floating trust, like the floating fee, becomes attached to the land.

This explication is perhaps unnecessary for the sake of the conclusion, which will hardly be denied, that the trust becomes definite, and relates back to its origin, as soon as the grant becomes definite. But it is of value as showing that not only as to the legal fee, but as to the equitable estate and all the incidents of a trust, we are on another plane, we breathe another air, we have different criteria from those of the older estates and the stricter trusts pertaining to them.

For if grants of such magnitude, under such novel circumstances, must be dealt with more liberally, freed from technical rigor of the common law, surely in a court of equity, on a subject solely of equitable origin—a trust—we may apply the same liberal notions.

With this standard of criticism we can now take up the objections to the indefiniteness of the beneficaries, and of the beneficial interest created in them.

It cannot be denied that in ordinary private trusts the beneficiary must be definitely identified by the terms of the trust, while in charitable trusts the opposite holds—the trust instrument must indicate not individuals but classes, and all those who fall within the class are beneficaries, entitled to par-

take. But just as with the floating grant, as a title in fee, so this provision that the lands *"shall be sold to actual settlers"* creates a novel kind of trust, neither private nor charitable, but in the nature of each. Like a private trust, it is not actuated by motives of sheer philanthropy, religion or benevolence. Like a charitable trust, it is offered to all who can bring themselves within the class named. To avail oneself of it is optional, but anyone who becomes or is ready to become an actual settler, when the railroad company will let him go on the land, thereby identifies himself as a beneficiary. "That is certain which can be made certain." Such an one is a person pointed out by the statute as one to whom the land "shall be sold." There is, then, a definite beneficial interest fixed in a designated *locus,* parcel of the granted estate, and inhering in a definite person as soon as he by proper acts of selection, tender of cash and offer to settle brings himself within the class. The very fact that any one whosoever (having the proper qualifications), so to speak, can precipitate upon himself this inchoate or floating right, and make it fixed and vested in him, shows "an intention to create a beneficial interest." That Congress held out the offer and required the company in accepting the grant to hold out the offer to anyone to bring

himself within the favored class proves that Congress meant to attract takers, and to give them the right to insist on taking the prize. The company, therefore, received and held the prize, be it worth more or less, for those who proved the right to take it. *In short, it held it in trust for them.* The so-called "restraint" on the company was not so much that as it was a limitation of the class of individuals to whom the offer was open. It was just like the analogous terms of the pre-emption and homestead laws. All who choose, and who meet certain tests and do certain things, can acquire so much land where they choose. When one meets the tests and does the things he gets a vested right —*an equitable title in fee*—and the federal judiciary will protect it against the whole power of the General Land Office or of Congress.

When a given thing is the subject of sale but the owner has the option to say whether he will sell it to a given person or to any one of a given class, or at all, he cannot be said to hold it in trust for one who offers to buy and tenders the price. But if the option is in one of a given class to buy at a named price, and the owner has agreed to sell at that price to him who tenders it, he has put himself under bonds to sell. He holds in trust for the proposed vendee.

If he is forbidden to sell to any other one, or to one not of a named class, *it is only that he may hold the trust estate for him who fastens thereon his equitable right to it.* This is no more than the commandment expressed or implied in every trust, *that the trustee shall hold the fund for, and not divert it from, the uses of the trust.* The absolute owner is free to sell or not at his own choice. The owner under terms to sell to certain persons named or to be named is bound to sell accordingly; and that is a trust.

So much for the clause (or "restraint," if you will) as to "actual settlers." The other two clauses about quantity and price need not detain us long.

The elastic or discretionary range of area and compensation seems to the counsel for the United States inconsistent with the idea of a trust. The objection comes with ill grace from one who has labored the point that a restraint within a class, or a prohibition to sell outside of a class, does not consist with a trust. He first says it is not a trust because the company cannot sell to any one it chooses, and next he says it is not a trust because the grantee can sell to A one parcel of ten acres at $2.50, and to B another parcel of one hundred sixty acres at $1.75, if it thinks those are the best prices it can get for those particular parcels. But

no inconsistency exists. Each limitation in class, area and price, only aids the object of Congress to get the road built and the land occupied. As to the *class,* there must be an inflexible rule. No gradation can exist. Settlers do not shade off into near-settlers, part-settlers, and so on. A man and his family are either "actual settlers" or absentee owners. And the very thing that costly experience had shown was that absentee ownership was fatal to the whole scheme of development by railroads and land sales. But as to *area* and *price,* it is quite otherwise. Infinite gradations are inherent in their nature; they have been potentialities in numberless land sales ever since Abraham bought the cave of Macpelah for a family burial lot. The final result is a balance between the needs and wishes of the seller, and the means and wishes of the buyer, influenced by soil, climate, population, intended use, access, markets—by an infinity of circumstances. In the nature of things, where the owner was bidden *and bound* to sell, but the applicant was *not bound but merely allowed* to buy, a minimum limit of area or price was not needed—indeed would have been absurd. The self-interest of the one would of itself fix a limit of price below which it would not sell, and that of the other a limit of area below which he would not buy.

Otherwise as to maximum limits. Unless a *maximum limit of area* for sale to one person were set, the company could wreck the congressional policy of inducing abundant immigration, and even fraudulent evasion of the settler clause would be facilitated. But also, unless the applicant and intending "actual settler" had a right, of his own choice, to buy a quantity sufficient for profitable settlement and use, the company could prohibit settlement. It could say: "We will sell you one acre." The limit of area was therefore essential as a *restriction* on the company and a quantity, compulsory on the company while optional on the applicant, *below which the former could not depress his demands.* That of itself proves that Congress created in the intending settler *a beneficial interest* to a definite amount at his option. Looked at in one way it is a restraint on the grantee of Congress. Looked at in the other way, it was an instruction to a trustee to dispose of the trust estate under limitations promoting the policy of Congress, and ensuring the rights of its beneficiaries against any arbitrary control by the trustee.

Likewise with the *maximum limit of price.* Obviously, unless that too were fixed, the Company could set a price of $100 per acre for any quantity up to the limit of area. It would be as easy to nullify the policy of the Government by a prohibi-

tive price as by a minute area. In the nature of things, there must be control over the action of every trustee, to exclude sinister motives and secure good faith. If such requirements betoken distrust, then every trustee is feared and distrusted. Just as with the area, there was a price limit past which the company could not force the buyer, but a range of price up to that limit open to negotiation as usual. And just as with the area, that gave the buyer an optional power to compel a sale to him at that price, if he could do no better and was willing to pay that for the parcel he wanted. And similarly that gave him *a beneficial interest* in the trust estate, which became a fixed right to a definite parcel when it was selected; and therefore it became *a vested equitable right in that parcel.*

4. The duty of the trustee.

All these limitations in the proviso are instructions to the company what to do or not to do. They are the contents of the trust. A trust without instructions, express or implied, is unthinkable. If it is an express trust, the words of the document lay down the instructions. If an implied trust, the court infers the instructions—and the limitations not to do otherwise, which are the negative side of the instructions. The counsel for the Government argues that there is no trust because of lack of

definite orders to the grantee what to do. But we have shown that there are either in words, or to be extracted by fair inference, very definite things to do within a discretion of elastic yet reasonable limits.

(1.) The granted lands are to be sold,—not sacrificed at slaughter prices, but marketed at reasonable prices:

a. To actual settlers—*no discretion.*

b. In quantities not over 160 acres—*a wide discretion.*

c. At prices not over $2.50 per acre—*a wide discretion.*

(2.) The proceeds of sales are to be retained by the company and used to build its road.

Now here are all the elements of a trust which we have been discussing: A "settlor" of the trust, a competent corporate trustee, a trust estate or subject-matter, beneficiaries pointed out in general terms and identified by their own acts under impulse of their self-interest, of which beneficaries the trustee constitutes one, and duties definite within wide yet proper limits plainly prescribed—all to be found in the language of two acts of Congress.

Every one of the limitations and the elastic discretion within two of them comports with the whole land policy and the railroad grant policy of the United States. Nay more—they actively pro-

mote those policies. In no detail do they compete with them. The limits of buyer, area and price exactly accord with the Government's. The more land sold by the company under the given terms, the better for the railroad, the better for the Government as owner of adjoining lands, the better for the buyers, the better for the sparsely settled West, the better for the whole United States of America. Where can anyone find a single element in this situation which negatives a trust? It is definite within reasonable limits. All trusts are definite—some more, some less. It contains wide discretionary powers. Many trusts do. If honestly administered, it effectuates its object and realizes the general policy of which it is a part. And it is embodied in a form of words which are consonant with the idea of a trust and are capable of being so construed.

Much reliance was placed in argument on the demurrers below upon two cases involving provisos like the one here.

Warrior River Coal & Land Co. vs. Ala. State Land Co., 154 Ala. 135; 45 Sn. 53.

Nichols vs. Southern Oregon Co., 135 Fed. 232.

In the first case, there was a land grant by Congress to the State of Alabama to aid in the

building of railroads; the state (by the terms of a proviso) was to sell under limits like those in this case. The state held *in trust* to aid the railroad companies by paying them the proceeds. In a line of previous cases involving this land grant and proviso it had become settled law that the state had invested Swan & Billups with the legal title of *a large quantity* of lands which it conveyed to them *as trustees* and they sold out to others. These cases are cited in the opinions. This cause was ejectment between a remote grantee of Swan & Billups and one in adverse possession. The validity or effect of the proviso was not involved. The case really turned on two questions: (1) Whether a certain deed by Swan & Billups was their deed *as trustees;* (2) Whether a dismissal of a prior bill to quiet title between the same parties operated as *res adjudicata.* Incidentally the court said: "The legal title to the granted lands having vested in the state, and the beneficial interest in the railroad company having become individualized as to the land and the companies respectively, the land here in controversy included, by the performance of all conditions precedent erected by the national grant, the limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting

government, and by that only. This record, of course, shows no such action on the part of the United States. Certainly, it will not be presumed, however conclusively a breach of the quoted condition was shown. Hence the objections urged as upon a violation of the stated condition subsequent is untenable." 45 Sn. 54.

This is all that was said on that point. It is far from a holding that the proviso was a condition subsequent, and not a trust. As a piece of logic for the Government's case, it begs the question. The only way to adjudicate to that effect would be to hold that one taking under a sale in violation of the proviso had no title.

The second case cited was a bill to compel conveyance by the Southern Oregon Company of a quarter section to one who had selected it out of a land-grant to the state under a similar proviso, and had tendered the limited price. The learned district judge, on demurrer to the bill, simply holds without discussion or citation that the grant was not a law for the sale; the restrictions were mere incidental regulations for the state to observe whenever it chose to sell, enforceable only by the United States and creating no interest in the complainant as a beneficiary. This enunciation is a mere *ipse dixit*, and seems to us valueless except as the indi-

vidual opinion of the writer. And it is weakened by the fact that the court holds that by sundry mesne transfers the trust, if any, had been openly repudiated for thirty years, Congress had taken no action, and the complainant was barred by lapse of time and by laches.

These two cases are the only ones that the great diligence of counsel for the Government has discovered as involving the proviso at bar.

Much argument was also expended by him in applying the common law doctrines of conditional estates to the proviso, and proving by many authorities that the words "provided," and "on condition that" are appropriate to conditions subsequent, and frequently introduce such. We do not dispute it. They often are so used. But the conclusion of the syllogism does not necessarily follow. It would follow only if it were shown that the words always are and must be read as a condition subsequent. Without that, it still remains a question of construction not of the bare words, as it were *in vacuo,* but of the words with the surrounding circumstances and in their light. The minute it is admitted that there is not a cast iron rule that a clause beginning "Provided that," or "On condition that" is a condition subsequent, that minute

all the mediaeval learning of Littleton and Coke becomes useless lumber as to a case like this.

Now that there is an abundance of cases holding that those words, and like conditional clauses create a trust and not a condition subsequent is indisputable. A few will suffice:

A conveyance "upon the condition that it shall be forever for the use of."

Neely vs. Hoskins, 84 Me. 386; 24 Atl. 882.

"With this express condition and limitation."

Mills vs. Davidson, 54 N. J. Eq. 659; 35 Atl. 1072.

"Upon the express condition that said premises shall be forever held and used," etc.

Ashuelot Nat. Bk. vs. Keene, 74 N. H. 148; 65 Atl. 826.

"On condition that the second party shall always continue to be called," etc.

Mackenzie vs. Trustees, 65 N. J. Eq. 652; 61 Atl. 1027.

"Upon condition that the said strip of land shall be forever kept open," etc.

Greene vs. O'Connor, 18 R. I. 56; 25 Atl. 692.

"Upon this express condition" that a devisee pay certain legacies.

Wright vs. Wilkin, 2 Best. & S. 232.

This case is instructive, because it holds that the devisee instead of forfeiting the estate for a breach, holds it in trust for the legatees whom he is to pay. He is in exactly the position of the railroad company here.

In *Mills vs. Davidson,* 54 N. J. Eq. 659; 35 Atl. 1072, above cited, is found the following pertinent remark:

"Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance for a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to, *not by the forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts.*"

And the Supreme Court of New Hampshire has well said that words of condition "*will not be held to have that arbitrary and technical effect and meaning, if such effect and meaning shall be found to be contrary to the intention of the parties or the policy of the law. The form of language will not necessarily control the sense, but will receive such an interpretation as circumstances and equity under those circumstances may require.*"

Hoyt vs. Kimball, 49 N. H. 322, 325.

That sums up our entire line of argument, and amply justifies the construction we put on the proviso. But a few words may be added on the contrary construction.

In testing an assumed construction by the rules of good sense and public policy, we must consider what parties under that construction could have done rather than what they actually did. Now if this proviso is a condition subsequent, of course a breach gave a right of instant forfeiture. Forfeiture of what? Of the whole unsold area? Or of only the parcels involved in the breach? If the breach were by sale of ten thousand acres at $5.00 to a lumber company, would only those lands or the whole grant revert? And so of a breach by a refusal to sell a quarter section to an "actual settler." In other words, is the grant to be treated as severable or a single unit *quoad hoc?* Now the trust theory involves no such practical difficulties. A court of equity will carry it out, enforce the trust as to each applicant in detail and mould its decrees exactly to the circumstances.

A forfeiture if carried out would doubtless not destroy the vested rights of those who had bought within the limits stated, at least before breach, prob-

ably even before forfeiture declared and suit brought. But all tracts conveyed in breach of the proviso would be forfeitable. The rigor of the law would take its course. Yet it would be much more just and equitable to hold the railroad company to account for the land sold in violation of the terms of the proviso, on the ground of a trust and a tortious conversion of trust assets. That could be done only on the trust theory, and the tortious trustee could properly be held for the real value, not merely for the $2.50 per acre, or for the excess of price over that figure. Such a course would not unsettle titles, since the Government could pursue the trustee and not disturb the purchaser.

Far more important, however, would be the practical effect of a forfeiture, if carried out, on the land policy of the Government. For it would throw a very large part of this grant back into the general domain of the public lands; it would annul the whole scheme of this grant until a new grant were made or other steps taken to parcel out the land to settlers. The grant was made with intent to have the lands disposed of on the terms stated. A court of equity on the trust theory can compel that to be done. It can even remove the trustee, appoint a new one and order him to dispose of the lands as agreed, and to pay the proceeds to the railroad

company, less the expenses of executing the trust. No court can enforce a forfeiture and at the same time effectuate the object and serve the policy of the grant. That is the best of all possible reasons for saying that Congress did not intend to make a grant involving a defeasance destructive of its moving cause.

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